

Advocacy in Action: school places during a national pandemic

In this second Advocacy in Action update, we consider the issue of claims arising from school placements during Covid-19 lockdown.

02 March 2021

Please note: the information contained in this legal update is correct as of the original date of publication

Browne Jacobson Barristers have recently celebrated their 10th Anniversary. Over the coming editions of BeConnected, our team of qualified barristers will be reflecting on their extensive experience at hearings before Courts and Tribunals nationwide to identify key issues and lessons for education providers. This, the second in the Advocacy in Action series, will consider the issue of claims arising from school placements during Covid-19 lockdown.

The government's decision in March 2020 that most pupils in England should be educated at home was an unprecedented situation for schools. Emergency guidance sought to place important decisions about the education of individual pupils in the hands of educators and local authorities at a time when schools nationwide were racing to adapt to meet the needs of their communities.

Inevitably, a number of parents have been disappointed not to have their children educated at school during periods of lockdown, and for those parents whose children have special educational needs or disabilities, this can lead to schools having to justify their decision-making in the face of a Disability Discrimination Act claim. Browne Jacobson Barristers have already represented a number of schools in such claims.

The parent of Pupil A brought a number of discrimination claims against the school. One of those claims related to school placement during the national lockdown. The school had taken the decision in March 2020 to close the school to all year groups apart from children of key workers and those who were vulnerable and could not remain at home. The Tribunal was asked to consider whether the school had discriminated against a pupil by refusing that pupil a place at the school during the national lockdown.

The period in question was between March and May 2020. The DFE published guidance on school placements on 19 March 2020. The guidance read as follows:

- 'And the most recent scientific advice on how to further limit the spread of Covid-19 is clear. If children can stay safely at home, they must, to limit the chance of the virus spreading';
- 'That is why the government has asked parents to keep their children at home, wherever possible, and asked schools to remain open only for those children who absolutely need to attend';
- 'It is important to underline that schools, all childcare settings (including early years settings, childminders and providers of childcare for school-age children), colleges and other educational establishments, remain safe places for children. But the fewer children making the journey to school, and the fewer children in educational settings, the lower the risk that the virus can spread and infect vulnerable individuals in wider society';
- 'Schools, and all childcare providers, are therefore being asked to continue to provide care for a limited number of children - children who are vulnerable, and children whose parents are critical to the Covid-19 response and cannot be safely cared for at home'.

The school accepted that Pupil A was vulnerable due to his disability, but the school recognised the importance of following guidance to educate children at home where possible in order to circumvent the risk of transmission, protecting pupils, staff members, and by extension the local community. The school conducted a risk assessment for Pupil A and, significantly, had incorporated the Claimant's input into this assessment.

During the hearing, we were able to support the school in identifying and explaining to the Tribunal the specific risks that may have arisen had Pupil A been permitted to attend the school. We also highlighted to the Tribunal that there was an absence of documentary evidence to demonstrate that the Claimant had specifically asked for Pupil A to have a place at school during the lockdown.

The Claimant sought to rely upon fleeting references to placement in the emails that she had sent to the school, but the Tribunal agreed with our submissions that those emails did not demonstrate conspicuous notice from the Claimant that a placement at the school was sought for Pupil A. One may have expected, for example, the Claimant to have made a request during the risk assessment process.

The Claimant formulated their claim under Section 15 of the Equality Act 2010. This claim had difficulties as whilst the decision to educate Pupil A at home could arguably amount to unfavourable treatment in that the pupil was not being taught in the classroom, it was difficult to see how this treatment could have arisen from the pupil's disability because the decision to educate pupils at home had plainly arisen as a result of government guidance, which applied to all pupils.

Moreover, Pupil A had been treated more favourably than other pupils who were not disabled or vulnerable in that his possible attendance at school had been considered and risk assessed.

The Claimant also framed this head of claim under Section 20 of the Equality Act 2010. We challenged this claim on the basis that the Claimant had not identified with any precision what the provision, criterion, or practice was which placed the pupil at a substantial disadvantage in comparison to those who were not disabled. The Tribunal agreed with our submissions on this point, and the Claimant's claim was dismissed in its entirety.

It is not too much to say that the education of every pupil in the country was significantly impacted during this period; the school's pupils were no different. Notwithstanding this, schools may well be confronted with future discrimination claims arising from decisions not to offer school places for disabled pupils during national lockdowns. When making decisions on school placements, schools should be alive to the following points:

- Risk assessments need to be detailed enough to capture all salient risks;
- Risk assessments need to be amended to reflect updated positions;
- Risk assessments should include parental input, and such input should always be recorded;
- If a place can be offered to a pupil, this should be communicated to the parents in a clear way;
- Any decision reached should clearly reference up-to-date guidance;
- Schools should seek advice from local authorities and other relevant professionals;
- Schools should ensure that they have requested all the support available before deciding that they cannot provide a place for a pupil;
- Schools need to consider the situation at home and the situation at school in order to properly determine which place is safer.

Browne Jacobson Barristers regularly appear at inquests, Disability Discrimination Act claims, EHC Appeal hearings and Independent Review Panel hearings for exclusions for both schools and local authorities. Our team of barristers also provide specialist advice and advocacy services to the Department for Education and Further Education settings and specialise in disciplinary proceedings. You can instruct one of our barristers either through Browne Jacobson's Education Team or by contacting our Lead Clerk, Claire Smith, at Barristers@brownejacobson.com or on [0330 045 2323](tel:03300452323).

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